

LIM GAIT TONG

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v.

THE DEVELOPMENT BANK OF SINGAPORE LTD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ MOHAMAD JCA
TENGKU BAHARUDIN SHAH JCA
MOHD NOR ABDULLAH JCA
[CIVIL APPEAL NO: P-02-145-2001]
6 APRIL 2010

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CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Setting aside of foreign judgment - Whether there were defects rendering registration of judgment a nullity - Non-compliance of procedural requirements, whether invalidated action - Miscarriage of justice - Reciprocal Enforcement of Judgments Act 1958, s. 4(3) - Rules of the High Court 1980, O. 67 r. 5(2)*

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CIVIL PROCEDURE: *Judgments and orders - Foreign judgment - Setting aside - Whether there were defects rendering registration of judgment a nullity - Non-compliance of procedural requirements, whether invalidated action - Miscarriage of justice - Reciprocal Enforcement of Judgments Act 1958, s. 4(3) - Rules of the High Court 1980, O. 67 r. 5(2)*

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CIVIL PROCEDURE: *Appeal - Fresh evidence - Application to adduce - Whether evidence to be adduced not specified and manner of its production not provided for by law - Reasonable diligence - Whether evidence unlikely to influence result of appeal*

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EVIDENCE: *Fresh or further evidence - Application to adduce - Whether evidence to be adduced not specified and manner of its production not provided for by law - Reasonable diligence - Whether evidence unlikely to influence result of appeal*

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The respondent obtained a judgment against the appellant in the Singapore High Court, which judgment was duly registered in the Penang High Court under the Reciprocal Enforcement of Judgments Act 1958 ('Act') and O. 67 of the Rules of the High Court 1980 ('RHC'). The appellant's subsequent application to set aside the judgment was dismissed, resulting in the present appeal. There were

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- A two main grounds canvassed in this appeal: (i) the order made was defective. Reference was made to the originating summons which was granted in terms and the order extracted by the respondent which purported to go beyond the prayers asked for by incorporating matters not applied for, in particular the second and third orders. It was contended that since the order extracted was not in the prescribed Form 145, such defects rendered its registration a nullity and no attempt had been made to cure the irregularities; and (ii) the amount stated did not comply with s. 4(3) of the Act, which required that the judgment sum be in Malaysian currency at the exchange rate prevailing at the date of the original judgment. It was submitted that an erroneous calculation of the amount of the debt rendered the order defective and a nullity. The appellant also sought leave to adduce fresh evidence for use during the appeal.

D **Held (dismissing the appeal with costs)**
Per Tengku Baharudin Shah JCA delivering the judgment of the court:

- E (1) The appellant's application to adduce fresh evidence was couched in terms so general that it did not specify the evidence sought to be adduced, and the manner of its production was not provided for by law. If granted, the resultant order would be so wide and absurd as to permit any evidence to be brought in regardless of, and contrary to, the limitations and conditions prescribed in the Courts of Judicature Act 1964 or the Rules of the Court of Appeal 1994, and would defeat the purpose of those provisions. Further, the documents that the appellant wanted to produce could have been obtained with reasonable diligence well before the setting aside application was heard, and such evidence, on the facts, would be unlikely to influence the result of the appeal. For these reasons, the appellant's application ought to be dismissed. (para 4)
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- H (2) On the facts, the second order was neither irregular nor prejudicial to the appellant. It did not alter the substance of the original judgment, hence causing no injustice. It satisfied the requisites of the Act and thereby complemented the first order. The inclusion of the 14-day period in the third order did not in any way prejudice the appellant as he had in fact made his application to set aside the registration. Order 67 r. 5(2) of the RHC requires the period to be stipulated in the order and that
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was done. There is no requirement for the court to determine the period and, as such, the court's approval of the order with the period so stipulated must be deemed to be inclusive of the period stipulated even though not prayed for in the application. In any event, it was a minor irregularity, if at all, which was insufficient to nullify the registration. (paras 9 & 10)

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(3) The second order was an extension of the first order and the equivalent Malaysian currency of the amount due on the original judgment was clearly shown. As for the applicable exchange rate, no objection was ever raised nor was there evidence to show that different rates prevailed at the material time. There was, thus, no merit in this argument. (para 12)

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(4) The non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice. In the present appeal, the appellant did not suffer any form of injustice and no interference was, therefore, warranted. *R v. Immigration Tribunal ex p Jayenathan* (foll); *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Ltd* (foll). (para 13)

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Bahasa Malaysia Translation Of Headnotes

Responden telah memperolehi suatu penghakiman terhadap perayu dalam Mahkamah Tinggi Singapura, yang mana penghakiman tersebut didaftarkan dalam Mahkamah Tinggi Penang di bawah Akta Penguatkuasa Salingan Hukuman 1958 ('Akta') dan A. 67 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan kemudiannya perayu untuk mengenenpikan penghakiman tersebut telah ditolak, mengakibatkan rayuan semasa. Terdapat dua alasan-alasan utama yang dihuraikan dalam rayuan semasa: (i) perintah yang dibuat cacat. Rujukan dibuat pada saman pemula yang telah dibenarkan dalam terma-terma dan perintah yang telah dikeluarkan oleh responden yang dikatakan telah melampaui tuntutan-tuntutan yang diminta dengan menggabungkan perkara-perkara yang tidak dipohon, terutamanya perintah-perintah kedua dan ketiga. Ia telah dihujahkan bahawa oleh kerana perintah yang dikeluarkan bukan dalam Borang 145 yang ditetapkan, kecacatan-kecacatan sebegitu menjadikan pendaftarannya suatu pembatalan dan tidak ada apa-apa percubaan dibuat untuk membetulkan luar aturan-luar aturan tersebut; dan (ii) amaun yang dinyatakan tidak mematuhi s. 4(3) Akta, yang

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- A memerlukan jumlah penghakiman dinyatakan dalam matawang Malaysia pada kadar pertukaran semasa tarikh penghakiman asal. Ia telah dihujahkan bahawa sesuatu pengiraan silap amaun hutang tersebut menjadikan perintah itu cacat dan batal. Perayu juga menuntut kebenaran untuk mengemukakan keterangan baru untuk digunakan semasa rayuan.
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Diputuskan (menolak rayuan dengan kos)

Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:

- C (1) Permohonan perayu untuk mengemukakan keterangan baru diungkapkan dalam bentuk yang terlalu am sehingga ia tidak menentukan keterangan yang ingin dikemukakan, dan cara mengemukakannya tidak disediakan oleh undang-undang. Jika dibenarkan, perintah akibatnya akan terlalu luas dan tidak munasabah yang akan membenarkan apa-apa keterangan untuk dikemukakan tanpa menghiraukan, dan bertentangan dengan, had-had dan syarat-syarat yang ditetapkan di dalam Akta Kehakiman Mahkamah 1964 atau Kaedah-kaedah Mahkamah Rayuan 1994, dan akan menewaskan tujuan peruntukan-peruntukan tersebut. Lagipun, dokumen-dokumen yang perayu ingin kemukakan boleh diperolehi dengan kerajinan munasabah lama sebelum permohonan pengenejian tersebut itu didengar, dan keterangan sebegitu, atas fakta-fakta, tidak mungkin akan mempengaruhi keputusan rayuan. Atas sebab-sebab ini, permohonan perayu seharusnya ditolak.
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- G (2) Berdasarkan fakta-fakta, perintah kedua bukan suatu luar aturan atau memprejudiskan perayu. Ia tidak mengubah isi penghakiman asal, oleh itu tidak mengakibatkan ketidakadilan. Ia memenuhi keperluan-keperluan Akta dan oleh yang demikian melengkapkan perintah pertama. Kemasukan tempoh 14 hari di dalam perintah ketiga tidak dalam apa-apa cara memprejudiskan perayu kerana beliau telah sebenarnya membuat permohonannya untuk mengenejian pendaftaran tersebut. Aturan 67 k. 5(2) KMT memerlukan tempoh ditetapkan dalam perintah dan itu telahpun dibuat. Tidak ada keperluan bagi mahkamah menentukan tempoh dan, oleh yang demikian, kelulusan perintah oleh mahkamah dengan tempoh yang dinyatakan mesti dianggap supaya termasuk tempoh yang dinyatakan walaupun tidak
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dituntut dalam permohonan. Walau apapun, ia suatu luar aturan kecil, jika betul pun, yang tidak mencukupi untuk membatalkan pendaftaran. A

- (3) Perintah kedua adalah perlanjutan perintah pertama dan matawang Malaysia setara dengan amaun yang perlu dibayar pada penghakiman asal jelas ditunjukkan. Bagi kadar pertukaran yang digunakan, tiada bantahan yang telah dibangkitkan dan tiada apa-apa keterangan menunjukkan bahawa terdapat kadar berbeza pada masa material. Oleh yang demikian, tidak ada merit dalam hujahan ini. B C

- (4) Ketidakpatuhan dengan keperluan-keperluan prosedural tidak seharusnya dianggap sebagai membatalkan apa-apa tindakan atau prosiding lain atau langkah diambil kecuali jika ia mengakibatkan suatu salah laksana keadilan. Dalam rayuan semasa, perayu tidak mengalami ketidakadilan dalam apa-apa bentuk dan gangguan, oleh itu, tidak diperlukan. *R v. Immigration Tribunal ex p Jayenathan* (diikuti); *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Ltd* (diikuti). D

Case(s) referred to: E

Ladd v. Marshall [1954] 3 All ER 745

Lau Foo Sun v. Government of Malaysia [1970] 1 LNS 56 FC (**refd**)

Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals [2004] 4 CLJ 282 CA (**refd**)

OCBC Bank (Malaysia) Bhd v. Tan Chong Keat & Anor And Another Case [2005] 8 CLJ 418 HC (**refd**) F

Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 4 CLJ 345 FC (**refd**)

R v. Immigration Tribunal ex parte Jayenathan [1999] 3 All ER 221 (**fol**)

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Ltd [2003] 3 CLJ 532 (**fol**) G

Legislation referred to:

Courts of Judicature Act 1964, ss. 69(1), 72

Reciprocal Enforcement of Judgments Act 1958, s. 4(3), (6)

Rules of the Court of Appeal 1994, r. 7(3A)

Rules of the High Court 1980, O. 67 r. 5(2) H

For the appellant - Zainur Zakaria; M/s VM Mohan, Fareed & Co

For the respondent - Karin Lim (Dominic Pillai with her); M/s Presgrave & Matthews

[*Appeal from High Court, Pulau Pinang; Originating Summons No: 24-1952-1999 (MT 4)*] I

- A [Editor's note: For the High Court judgment, please see *The Development Bank of Singapore Ltd v. Lim Gait Tong* [2002] 5 CLJ 127.]

Reported by Suresh Nathan

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JUDGMENT

Tengku Baharudin Shah JCA:

- C [1] A judgment was obtained by the respondent against the appellant in the Singapore High Court on 14 May 1999. It was duly registered in the Penang High Court under the Reciprocal Enforcement of Judgments Act 1958 (Act 99) and pursuant to O. 67 of the Rules of the High Court 1980 (RHC) on 19 January 2000. The appellant applied to have it set aside on various grounds
- D but his application was dismissed on 27 January 2001, hence this appeal. We heard submissions of counsel at the end of which we dismissed the appeal with costs.

- E [2] The appellant earlier sought for leave to adduce fresh evidence to be used during the appeal which was objected to by the respondent. The relevant notice of motion did not state what the fresh evidence was except to say that it would be adduced by way of a supplementary record of appeal. It was sought to be adduced on grounds that it was not available before the learned trial judge
- F at the setting aside proceedings. It is apparent from the supporting affidavit that the appellant was sued in his capacity as a guarantor to the principal borrower (the company) which statements of accounts marked as exh. LGT5 the appellant wanted to bring in to show that the company in fact had a credit balance of US\$1 and
- G no debt due and owing to the respondent between December 1999 to May 2000. The appellant deposed that though the name of the company was changed in 1997 as per exh. LGT3 the account number was retained. He only came to know about LGT5 after the setting aside application was heard when applying for stay of the
- H order and it would have an important effect on the outcome of this appeal.

- I [3] Section 69(1) of the Courts of Judicature Act 1964 (the CJA) gives the court a discretion to receive further evidence by oral examination in court, by affidavit or by deposition taken before an examiner or Commissioner. Such further evidence cannot however be admitted unless the three *Ladd v. Marshall* [1954] 3 All ER 745

conditions are fulfilled. It was so held by the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 1 LNS 56. The three conditions are that such evidence would not have been obtained with reasonable diligence for use at the trial, it would probably have an important influence on the result of the case and it must be credible. Rule 7(3A) of our Rules of the Court of Appeal 1994 (the RCA) stipulates similar conditions for admission.

[4] The appellant's application is couched in terms so general that it does not specify the evidence sought to be adduced and the manner of its production is not provided for by law. If we were to grant the order in terms of the application the resultant order would be so wide and absurd as to permit any evidence to be brought in regardless of and contrary to the limitation and conditions prescribed in the CJA or the RCA and defeat the purpose of those provisions. Secondly, as is apparent from the supporting affidavit the appellant wanted to produce the statements of account of the company for the period between December 1999 to May 2000. These documents could have been obtained with reasonable diligence well before the setting aside application was heard. After all the appellant, as contended by learned counsel for the respondent, was not a mere guarantor but also a director of the principal debtor company. Hence there is a failure to satisfy the first condition of admission. Thirdly, the documents sought as explained by Chua Koh Hoe in the affidavit in reply of the respondent only relate to the writing off of a bad debt by the internal transfer of a debt deemed irrecoverable into a separate account though no payment was made. It does not affect the rights and obligations of the debtor as the debt is still outstanding and not extinguished (see *OCBC Bank (Malaysia) Bhd v. Tan Chong Keat & Anor And Another Case* [2005] 8 CLJ 418. In the event, such evidence would be unlikely to influence the result of the appeal. The circumstances did not commend the exercise of discretion in the appellant's favour as the conditions are cumulative and failure to fulfill any one of them is fatal. (See *Maju Holdings Sdn Bhd. v. Fortune Wealth (H-K) Ltd & Other Appeals* [2004] 4 CLJ 282).

[5] For the aforesaid reasons we dismissed the application with costs.

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A [6] Coming to the substantive appeal, several grounds are raised in the memorandum of appeal but before us only two main grounds were canvassed. They are that the application and the order made are defective and secondly the amount stated does not comply with s. 4(3) of Act 99. I shall address them in that order.

B [7] On the first ground we were referred to the originating summons which was granted in terms and the order extracted by the respondent which purports to go beyond the prayers asked for by incorporating matters not applied for, in particular the second and
C third orders. It was contended that as the order extracted was not in the prescribed Form 145, such defects rendered its registration a nullity and no attempt had been made to cure the irregularities.

D [8] We noted that the learned judge had duly considered the first point raised. He accepted the respondent's explanation and found substantial compliance and no prejudice caused to the appellant by the addition of the second order which imposes no new liability being mere clarification of the first order calculated up to the date of the order. The third order which specifies the period of 14 days
E of service for the appellant to come before the court to set aside the order also caused no prejudice as the appellant did make his application to set aside the order within that time. Even if it is not consistent with the order made by the learned judge on 19 January 2000 it is severable and is not a sufficient ground for setting aside
F the registration.

[9] Whilst agreeing with learned counsel that Form 145 merely provides for the registration of a foreign judgment with the statutory endorsement, we cannot ignore the requirements of s. 4(6) of Act 99 which is as follows:

G (6) In addition to the sum of money payable under the judgment of the original court, **including any interest** which by the law of the country of the original court becomes due under the judgment **up to the time of registration**, the judgment shall be registered for the reasonable costs of and incidental to registration including the
H costs of obtaining a certified copy of the judgment from the original court. (emphasis added)

I As submitted by learned counsel for the respondent they could not possibly determine the amount to be put in the application without knowing when the matter would be heard, hence the two supplementary affidavits providing the explanation; and the amount

had to be updated consequent to the adjournment of the matter. We agree with the learned judge that the second order is neither irregular nor prejudicial to the appellant. It does not alter the substance of the original judgment, hence no injustice is caused. It satisfies the requisites of Act 99 and thereby complements the first order. It is an extension of the first order.

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[10] We also agree with the learned judge that the inclusion of the 14 days period in the third order did not in any way prejudice the appellant as he had in fact made his application to set aside the registration. Order 67 r. 5(2) of the RHC requires the period to be stipulated in the order and that was done. There is no requirement for the court to determine the period as such the approval by the court of the order with the period so stipulated must be deemed to be inclusive of the period stipulated even though not prayed for in the application. In any event it is a minor irregularity, if at all, which is insufficient to nullify the registration.

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[11] The second issue relates to the requirement of s. 4(3) of Act 99 for the judgment sum to be in Malaysian currency at the exchange rate prevailing at the date of the original judgment. Taking the analogy of an order for sale under the National Land Code, it was submitted that erroneous calculation of the amount of debt rendered the order defective and is a nullity (*Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345).

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[12] With respect, neither point was raised in the court below nor formed a ground of the appellant's application to set aside. In any event, as indicated earlier, the second order is an extension of the first order and the Malaysian currency equivalent of the amount due on the original judgment is clearly shown. As for the applicable exchange rate no objection was ever raised nor is there evidence to show that different rates prevail at the material times. We also found no merit in this argument.

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[13] The courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. On a complaint of breach of a procedural provision the question to be asked is not whether the relevant provision is to be regarded as mandatory or directory. What the court should ask is whether the party complaining suffered injustice by reason of the procedural breach. In considering this appeal we were guided by this

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- A modern approach enunciated by Lord Woolf MR in *R v. Immigration Tribunal ex parte Jayenathan* [1999] 3 All ER 221 as adopted by this court in *Chong Keat Realty Sdn Bhd. v. Ban Hin Lee Bank Ltd.* [2003] 3 CLJ 532. The non-compliance of procedural requirements should not be treated as invalidating any
- B action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice. As in that case we likewise found no form of injustice occasioned to the appellant in the circumstances of this case. Section 72 of the CJA forbids appellate intervention on account of immaterial errors not affecting
- C merit or jurisdiction. We were therefore loath to interfere.

[14] The appeal was accordingly dismissed with costs.

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